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No. 79-1457

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
AFL-CIO LOCAL 1969, et al.,
Petitioners,

VS.

REBECCA BISE, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

RESPONSE TO THE BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

JOSEPH E. BERGERON
STEPHEN J. CAMBER
LAW OFFICES OF
JOSEPH E. BERGERON
520 El Camino Real, Suite 300
San Mateo, California 94402
Tel.: (415) 342-0873
Attorneys for Respondents

BOWNE-PERNAU WALSH • 1045 SANSOME ST. • S.F., CA 94111 • (415) 981-7882

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Respondents respectfully submit this brief in response to the views of the United States as expressed by the Solicitor General.

STATEMENT

The Solicitor General's statement regarding the facts in this case completely ignores the malicious, oppressive

and bad faith conduct of the Petitioner union[1] and the lack of evidence presented at trial to support the alleged violations of the union constitution. Respondents respectfully refer the Court to the Statement of the Case contained in their Brief in Opposition.

DISCUSSION

I

THE RULE OF FOUST SUPPORTS THE JUDGMENT HEREIN

In its brief, the Solicitor General's office states that its opinion regarding the availability of punitive damages under 29 U.S.C. 412 is based on this Court's decision in *IBEW v. Foust,* .... U.S. ...., 99 S.Ct. 2121, 60 L.Ed.2d 698 (1979) (Solicitor General Brief, p. 8). The brief further states that in *Foust*:

> "This court was required to determine whether the availability of punitive damages for a breach of the duty of fair representation would effectuate the purposes of the Railway Labor Act, which are to facilitate collective bargaining and to achieve industrial peace." ibid.

Accordingly, to be consistent with *Foust,* the instant case requires a determination whether the availability of punitive damages for violation of the rights given to union members under the LMRDA would effectuate the purposes of that act.

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[1]The jury, in response to Special Interrogatories, found specifically that the defendants did act "maliciously, oppressively and in bad faith in charging and trying the plaintiffs" Bise, Bradley, Carr, Kaona, Klatt, Ornellas, Pappas and Maxine Stones. (Clerk's Record, pp. 937-952)

Fortunately, said purposes are not a subject for conjecture having been explained in the case of *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967) as being:

> "*to protect union members* in their relationship to the union by adopting measures to ensure the provision of democratic processes in the conduct of union affairs and procedural due process to members subjected to discipline." *Allis-Chalmers,* supra, at 194. (Emphasis supplied)

It may be seen that the declared purpose of the LMRDA is to protect union members and not unions, and it is too plain for argument that an award of punitive damages would effectuate that purpose. The potential for exposure to punitive damages is a most powerful guaranty of those rights sought to be protected. The purpose of punitive damages is "to punish reprehensible conduct and to deter its future occurrence." *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 350 (1974).

Therefore, the application of the *Foust* standard of determining whether the award of punitive damages would further the purposes of the LMRDA would result in the same outcome as that reached by the district court. Contrary to the opinion of the Solicitor General that *Foust* requires an opposite result, that case is in actuality a strong support for the judgment of the district court. Furthermore, there is some question as to whether *Foust* is applicable herein. That case did not involve an action authorized by statute:

> "We are concerned here with judicially created remedies for a judicially implied cause of action." *Foust,* supra, fn. 9.

The instant case presents an opposite situation, the cause of action is created by statute, as are the remedies.

Therefore, whether *Foust* is viewed as being controlling or not on point, the propriety of the award of punitive damages herein is not affected by that decision. The statement by the Solicitor General's office that those cases permitting the recovery of punitive damages, such as *Boilermakers v. Braswell,* 388 F.2d 193 (CA5), cert. denied, 391 U.S. 935 (1968) are exceptions to the rule laid down in *Foust* (Solicitor General's brief, p. 17) is clearly erroneous.

II

THE RECOVERY OF PUNITIVE DAMAGES IS AUTHORIZED BY 29 U.S.C. 412

Under the above-mentioned statute, courts may grant "such relief (including injunctions) as may be appropriate" for violations of Title I of the LMRDA. How this language could have possibly been changed to give more latitude to the courts has not been suggested by any party to this litigation. Yet, the Solicitor General's office suggests that it was the intent of Congress that punitive damages not be available under this statute. (Solicitor General brief, p. 14.) This contention would seem to be difficult to support, for when Congress does not wish punitive damages to be available on a particular cause of action, it has not been bashful about explicitly stating that such is the case. See for example, 28 U.S.C. 2674, which specifically provides that the United States shall not be liable for punitive damages in actions under the Federal Tort Claims Act.

The amicus brief goes on to express concern over the "risk of endangering the financial stability of unions" (page 9) that is posed by the availability of punitive damages citing the case of *Gertz v. Robert Welch, Inc.*, supra. This reliance is strangely placed, for *Gertz* permits the recovery of punitive damages against a newspaper where a defamation has been knowingly and intentionally published, *Gertz*, supra, at 350, while the position of the Solicitor General's office is that this remedy is not available for even the most flagrant violation of the rights of union members if done "in the economic strike context" (Brief, p. 16). This position would bring about the illogical result that the exercise of the right of free speech is afforded less protection than the suppression thereof. The entire political philosophy and history of this country militates against such a result.

The brief further states that in addition to endangering the financial stability of labor unions, the result reached below would "impair the usefulness of labor's cherished strike weapon" (Page 13). This position is also suspect. The strike that gave rise to this litigation occurred over six years ago. Anyone familiar with the federal courts must acknowledge the absolute impossibility of going to trial and obtaining a final judgment between the commencement and termination of the typical strike. How a damage award long afterwards could affect the conduct of a strike is not explained, but an alternative remedy clearly authorized is not objected to. Injunctions are expressly made available by 29 U.S.C. 412, and the immediacy of this remedy does present the possibility of affecting an ongoing strike. Despite this possibility, Congress intended

that injunctions be available in an action under the LMRDA. This is consistent with Respondents' previous argument that the purpose of the Act was to protect union members and not unions, and is inconsistent with the Solicitor General's office's argument that a remedy that interferes with the ability of a union to strike was not intended by Congress.

For this Court to rule that punitive damages are not recoverable under the LMRDA would be to substitute the judgment of the Supreme Court for that of Congress. Respondents must respectfully submit that under the United States Constitution, the court does not have that power. In the early case of *McCulloch v. Maryland*, 17 U.S. 316, it was contended that the establishment of the Bank of The United States was politically unwise. The opinion of Justice Marshall carefully points out the court's lack of jurisdiction over such a controversy.

> "But where the law is not prohibited, and is really calculated to effect any of the objects entrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department and to tread on legislative ground. This court disclaims all pretensions to such a power."

Where, as here, no claim is raised that the statute in question is unconstitutional and its language is plain and unambiguous, requiring no interpretation, it would seem that no question is raised that requires the consideration of this Court. If, as has been suggested, the availability of

punitive damages under the LMRDA is a subject of controversy, that controversy may be easily settled by the denial of the petition for writ of certiorari herein. Such denial is called for by virtue of the governing statute and case law, and the application of logical reasoning, as Respondents have attempted to demonstrate. It is respectfully urged that the petition herein be denied.

Dated: September 30, 1980

Respectfully submitted,

JOSEPH E. BERGERON
STEPHEN J. CAMBER
LAW OFFICES OF
JOSEPH E. BERGERON
Attorneys for Respondents